UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIDDIS MUSIC, INC.,

Plaintiff,

- against -

05-CV-0491
DNH/DRH

TRANS WORLD ENTERTAINMENT CORPORATION,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PARTIALLY DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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MEMORANDUM OF LAW IN SUPPORT MOTION TO PARTIALLY DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

INTRODUCTION

Plaintiff Priddis Music, Inc. ("Priddis") manufactures and markets karaoke music. Compl. ¶ 2 (attached as Exhibit A to the Declaration of J. Matthew Donohue). Defendant Trans World Entertainment Corporation ("TWEC") operates retail music and entertainment stores throughout the United States doing business under various trade names, including "FYE - For Your Entertainment," "Coconuts," "Camelot Music," "Spec's Music," and "Record Town." Id. ¶ 4. In its Complaint, Priddis seeks damages against TWEC for: (1) fraud; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; (4) price of goods sold and delivered pursuant to U.C.C. § 2-709; (5) conversion; and (6) unjust enrichment.

With respect to its claims of (1) fraud; (2) breach of the implied covenant of good faith and fair dealing; (3) conversion and (4) unjust enrichment, Priddis fails to state any cause of action upon which relief can be granted. As pled, these claims suffer from the following fatal defects:

- Fraud – Having had its breach of contract claim dismissed for improper venue in Utah state court, Priddis now improperly casts its breach of contract claim as a fraud claim. Priddis's fraud claim, however, is grounded in the same factual allegations as its contract claim, and the parties' agreements govern the conduct of which Priddis complains. Although the Complaint alleges various "schemes to defraud," Priddis fails to allege any misrepresentation that would form a proper basis for a fraud claim. Accordingly, Priddis's fraud claim must be dismissed as a matter of law.

- Conversion – Priddis's conversion claim is duplicative of its breach of contract claim because TWEC's possession of Priddis's products and property is governed by the parties' agreements. Priddis fails to allege any separate duty or harm that would support tort liability. Priddis thus fails to state a cause of action for conversion.

- Unjust Enrichment – Priddis's claim for unjust enrichment is also duplicative of its breach of contract claim. Under New York law, a quasi-contractual claim such as unjust enrichment may only be brought in the absence of a valid and enforceable contract. Here, Priddis's claim for unjust enrichment is predicated upon the parties' binding agreements and therefore cannot be maintained as a matter of law.

- Breach of the Implied Covenant of Good Faith and Fair Dealing – Priddis impermissibly predicates its claim for breach of the implied covenant of good faith and fair dealing on the same allegations as its breach of contract claim. Given its pending breach of contract claim, a separate cause of action for breach of good faith and fair dealing must be dismissed as redundant.

In addition to the above, Priddis's request for exemplary damages and attorneys' fees must also be dismissed as a matter of law for reasons set forth below.

FACTUAL BACKGROUND AND ALLEGATIONS[1]

In 1999, TWEC contracted with Priddis to supply its karaoke products. Compl. ¶ 8. The parties subsequently entered into three agreements that governed the various aspects of their business relationship. These agreements – the Buy-Out Agreement, the Vendor Agreement, and the Display Agreement - underpin every single allegation relating to fraud, conversion, unjust enrichment and good faith and fair dealing in the Complaint.

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[1]On a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted, all material allegations of the complaint must be accepted as true, and all reasonable inferences drawn in favor of the nonmoving party. D'Alessio v. New York Stock Exch., Inc., 258 F.3d 93, 99 (2d Cir. 2001). Additionally, the court may consider documents referenced in the complaint and public records, including complaints filed in state court, in deciding a motion to dismiss. See Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002); Chambers v. Time Warner Inc., 282 F.3d 147, 152-54 (2d. Cir. 2002).

I. THE PARTIES' AGREEMENTS

A. The Buy Out Agreement

In or about May 25, 1999, TWEC and Priddis entered into an agreement whereby Priddis agreed to trade out TWEC's on-hand karaoke stock and replace it with Priddis's karaoke product ("Buy Out Agreement") (attached as Exhibit B to the Declaration of J. Matthew Donohue). Compl. ¶ 11 In addition to the trade-out, Priddis shipped TWEC a total of 1,000 additional units of Priddis's product with its regular pricing terms. See Buy Out Agreement, Exh. B. Under the terms of the Buy Out Agreement, the parties agreed that TWEC would not return any trade out product for cash credit, but that TWEC would be able to return any product ordered on regular terms for cash credit. Id. Pursuant to the terms of the agreement, Priddis accepted returns from TWEC and TWEC took a credit for $336,630. Compl. ¶ 13. Although Priddis now alleges that TWEC took $55,604 more in credit than it was entitled to, Priddis admits that it reconciled its account in TWEC's favor and "wrote off" the difference at the time TWEC took the credit. Id. ¶¶ 14, 15.

B. The Vendor Agreement

Shortly thereafter, on or about June 7, 1999, TWEC and Priddis executed a "Vendor Approval Request" form ("Vendor Agreement") (attached as Exhibit C to the Declaration of J. Matthew Donohue) which set forth the terms under which TWEC and Priddis agreed to operate. Compl. ¶ 26. Priddis admits that the Vendor Agreement is the main contract that governed the parties' relationship. Id. ¶¶ 26, 133. Under the Vendor Agreement, Priddis explicitly agreed that any regular orders placed by TWEC were 100% returnable with no exceptions. See Vendor Agreement, Exh. C. (emphasis added).

Additionally, the parties agreed to net 60-day payment terms, Compl. ¶ 44, and that TWEC would receive a 2% cash discount for timely payment. Id. ¶ 56. The Vendor Agreement does not have a durational term and thus could have been terminated with proper notice by Priddis at any time. See Vendor Agreement, Exh. C.

C. The Display Agreement

Priddis supplied racks to TWEC for the display of its product. Compl. ¶ 16. Effective October 1, 1999, TWEC and Priddis entered into a written Point of Sale Display Agreement ("Display Agreement") (attached as Exhibit D to the Declaration of J. Matthew Donohue) which set forth the rights and obligations regarding the display racks. Compl. ¶ 18. Pursuant to the Display Agreement, Priddis agreed to "advance a display to each store location" and TWEC agreed to "continue it's [sic] best efforts in purchasing and selling Vendor product until enough product has been purchased to fill all Displays shipped by Vendor to Buyer." Display Agreement, ¶ 3. Terms, Exh D. The parties further agreed that Priddis would own title to all the display racks "until such time as [TWEC] has completed it's [sic]obligation to purchase enough Vendor product to fill all displays shipped by Vendor to Buyer. Ownership will transfer to [TWEC] after one (1) year if Buyer has completed it's [sic] purchase obligation." Id., ¶ 4. Ownership. In the event TWEC defaulted on its responsibility to fill all displays or discontinued purchasing and/or selling Priddis's product, then TWEC was obligated "to return all displays to Vendor in good condition, at no cost to Vendor." Id.

II. THE UTAH ACTION

In or about February 2004, Priddis refused to accept TWEC's credits, refused to ship product to fill TWEC's orders, and terminated its relationship with TWEC. Compl.

¶ 116. On June 5, 2004, Priddis filed a simple four-page complaint in the state court of Utah alleging TWEC breached the Vendor Agreement, and seeking damages in the amount of $2,748,256.79 (attached as Exhibit E to the Declaration of J. Matthew Donohue). In a November 4, 2004 Order of Dismissal, the Utah court dismissed the complaint on the ground that the Vendor Agreement contained a binding forum selection clause designating New York as the proper forum for the action (attached as Exhibit F to the Declaration of J. Matthew Donohue).

III. THE CURRENT COMPLAINT

The Fraud Claim

After its Utah action was dismissed, Priddis transformed its simple, four page breach of contract complaint into a twenty-five page complaint containing a host of new causes of action, including fraud, all of which are premised on the same basic facts that were alleged in Priddis's original breach of contract claim.[2] Based on these facts, and the case law cited below, this fraud claim, as pled, fails to state a cause of action as a matter of law.

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[2] Priddis now also attempts to reassert its contract claim, alleging that TWEC has taken actions in breach of express promises contained in the Buy Out Agreement, Display Agreement and Vendor Agreement. Compl. ¶ 135. These allegations claim that TWEC failed to perform its obligations under these agreements by: (1) failing to pay for product that it ordered and received; (2) taking credit for more product than it returned; (3) making excessive returns of product; (4) reordering product that it had recently returned; (5) taking credit for anticipated returns; (6) taking credit for returns of non-Priddis product; (7) taking a discount on returns; (8) taking a discount on returns of non-Priddis product; (9) taking a discount on untimely payments; (10) taking a discount on anticipated returns; (11) taking a discount on more product than it returned; (12) requiring proof of delivery on shipments that it received; (13) deducting invoices from its payments for failure of Priddis to provide adequate proof of delivery; (14) unilaterally imposing a "rack placement" fee as a disguised advertising fee; (15) unilaterally imposing a distribution center fee, (16) failing to pay for express shipping costs; (17) failing to pay Priddis' restocking fees; (18) failing to use Priddis as its exclusive karaoke supplier; (19) displaying non-Priddis product in the displays supplied by Priddis; and (20) failing to return the display racks provided by Priddis. Compl. ¶ 136.

A. The Alleged Schemes to Defraud

Rather than simply reassert its claim for breach of contract, Priddis now additionally alleges that TWEC instituted fraudulent "schemes" as part of a "preconceived design" to withhold payments and conceal its intention to not pay for products ordered from Priddis and other suppliers. Compl. ¶¶ 122-25. Priddis alleges that TWEC "had no present intention of paying Priddis for all the products it ordered and received" at the time it made the false representations and implemented the schemes. Id. ¶ 127. Priddis claims TWEC employed three distinct fraudulent schemes -- involving returns, discounts, and proof of delivery -- all of which flow from the parties' contractual relationships and, as shown above, are also pled as part of Priddis' breach of contract claim.

(i). The Alleged Fraudulent Return Scheme

Priddis alleges that TWEC returned product to Priddis on a monthly basis and reordered items that it had returned. Id. ¶ 38-41. Without mentioning TWEC's unrestricted contractual right to return products, Priddis further alleges that "TWEC's practice of returning and then reordering the same product was a scheme intentionally employed by TWEC to artificially extend its payment terms and perpetually delay making timely payments to its suppliers, such as Priddis, for product it ordered and received." Id. ¶ 42. Priddis additionally alleges that TWEC withheld payments to Priddis on past orders until Priddis shipped current orders so that TWEC could keep itself overstocked and continue its alleged fraudulent return scheme. Id. ¶ 49. Priddis also alleges that TWEC made large deductions from payments to Priddis for "anticipated returns," but then never made the actual returns to Priddis. Id. ¶ 51. Priddis asserts that

"TWEC's practice of taking large deductions out of its payments to Priddis for anticipated returns was a deliberate tactic employed by TWEC to fraudulently extend its payment terms and withhold payments from Priddis for product that it had ordered and received." Id. ¶ 54.

However, Priddis fails to allege, as required by law, any misrepresentation made by TWEC upon which it detrimentally relied in connection with the fraudulent discount scheme.

(ii). The Alleged Fraudulent Discount Scheme

As stated above, TWEC received a 2% cash discount for timely payment pursuant to the Vendor Agreement. Id. ¶ 56. Priddis alleges that TWEC improperly, and in contravention to the Vendor Agreement, took a 2% discount on all products returned to Priddis. Id. ¶¶ 56-57. Priddis alleges that "TWEC's practice of taking a 2% discount on returns, for which it never paid for in the first place, was a willful and deliberate effort to gain leverage against and to defraud its suppliers, including Priddis, out of money due and owing to them." Id. ¶ 61. Priddis additionally alleges that TWEC took a 2% discount for "anticipated returns" that were not actually made, id. ¶¶ 63-65, and delayed a promised payment of $86,000 to Priddis for approximately three months. Id. ¶¶ 66-68. Finally, Priddis alleges that TWEC promised but failed to change its procedures relating to discounts, took discounts for untimely payments, and took credit and discounts for more product than it actually returned. Id. ¶¶ 69-71.

Priddis, however, does not allege any misrepresentation made by TWEC upon which it detrimentally relied in connection with the fraudulent discount scheme.

(iii). The Alleged Fraudulent Proof of Delivery Scheme

TWEC stores use a computerized system to record product delivered by vendors, including Priddis. Id. ¶ 73. On occasion, (and normally when a store did not show whether it received a product shipment), TWEC demanded that Priddis present proof of delivery before it paid Priddis for the shipment. Id. ¶ 74. Priddis alleges that on several occasions, TWEC ignored the proof of delivery supplied by Priddis and took a credit on its account. Id. ¶¶ 75-76. Priddis admits, however, TWEC added back the amount it had deducted into future checks to Priddis. Id. ¶ 77. Nonetheless, Priddis still alleges that "TWEC's practice of requiring proof of delivery on shipments that it had received was a deliberate tactic employed by TWEC to fraudulently extend its payment terms and withhold payments from Priddis." Id. ¶ 78. Priddis further alleges that each and every "Check Overflow Remittance Advice" deducting amounts from payments to Priddis, and each and every "chargeback memorandum" taking credit for shipments on the basis that Priddis failed to provide proof of delivery, that TWEC sent to Priddis from 2001 through 2003 was in furtherance of the fraudulent scheme. Id. ¶ 79.

However, Priddis fails to allege, as required by law, that TWEC made any representation upon which it detrimentally relied in connection with the fraudulent proof of delivery scheme.

B. The Alleged Misrepresentations

The Complaint alleges three fraudulent misrepresentations by TWEC that Priddis detrimentally relied upon and which form the basis of Priddis's fraud claim: (1) a promise to release an $86,000 payment to Priddis (id. ¶¶ 66-68, 85-87); (2) promises, both oral and written, that TWEC would make payments so that Priddis would ship new orders to

TWEC (id. ¶ 80-84); and (3) a promise to release a $360,947 payment of which TWEC only paid $220,143 (id. ¶¶ 88-90).

For the reasons set forth below, the above allegations fail to state a cause of action for fraud, conversion, unjust enrichment and/or a breach of the implied covenant of good faith and fair dealing.

APPLICABLE STANDARD

While the Court must accept as true a plaintiff's factual allegations, "[c]onclusory allegations of the legal status of defendant['s] acts need not be accepted as true for the purposes of ruling on a motion to dismiss." Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995) (citation omitted). Accordingly, the Court need not credit conclusory statements unsupported by factual assertions, and is not "bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). A motion to dismiss may be granted where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1494 (2d Cir. 1992).

ARGUMENT

I. PRIDDIS'S FRAUD CLAIM MUST BE DISMISSED AS A MATTER OF LAW

Priddis's fraud claim is an impermissible recasting of its simple claim that TWEC breached certain provisions of the parties' agreements. Priddis attempts to transform its breach of contract claim into a fraud claim by generally alleging that TWEC employed fraudulent schemes, including the so-called return scheme and discount scheme, to obtain and continue to receive products from Priddis with the intent not to pay. Compl. ¶¶ 122-

25. The very substance of the alleged fraudulent schemes, however, is entirely governed by the Vendor Agreement which unambiguously sets forth terms regarding returns (to which TWEC has an absolute right) and discounts (2% cash discount for timely payment). See Vendor Agreement, Exh. C.[3]

As further described below, Priddis's allegations that TWEC falsely represented its intention to pay for its products, and that it justifiably relied on the alleged misrepresentations, do not support a fraud claim under New York law. Rather, Priddis's allegations fall squarely within its current breach of contract claim. See infra at n. 2. Because the touchstone of TWEC's alleged misrepresentations, and Priddis's alleged reliance, is the contractual relationships of the parties, the fraud claim must be dismissed.

"It is well settled in New York that mere allegations of breach of contract do not give rise to claim for fraud or fraudulent inducement." Ohm Remediation Servs. Corp., v. Hughes Envtl. Sys., Inc., 952 F. Supp. 120, 122 (N.D.N.Y. 1997) (quoting Rolls-Royce Motor Cars, Inc. v. Schudroff, 929 F. Supp. 117, 123 (S.D.N.Y 1996)) (citation omitted); see also Hargrave v. Oki Nursery, Inc., 636 F.2d 897, 899 (2d Cir. 1980) ("If the only interest at stake is that of holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort.") (citations omitted). As stated in Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co., 224 F. Supp. 2d 520 (W.D.N.Y 2002):

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[3] Priddis's allegations regarding TWEC's schemes to defraud are belied by the fact that the parties' agreements do not have any durational terms. Priddis was therefore free to end its relationship with TWEC, and escape the conduct it now complains of, at any time. See Chenoweth & Faulkner, Inc. v. Metro Mobile CTS, Inc., No. 87 Civ. 6294 (MJL), 1988 WL 52777 (S.D.N.Y. May 18, 1988) (stating that if contract is not fixed with a definite period of termination, then party need only give reasonable notice of termination) (Attached as Exh.1 to "Copies of Cases Reported Exclusively on Electronic Databases").

> [W]here a fraud claim arises out of the same facts as plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract. In other words, simply dressing up a breach of contract claim by further alleging that the promisor had no intention, at the time of the contract's making, to perform its obligations thereunder, is insufficient to state an independent tort claim.

Id. at 527 (citing Telecom Int'l Am. Ltd. v. AT&T Corp., 280 F.3d 175, 196 (2d Cir. 2001)). As the Frontier-Kemper court explained, "[t]he rationale for this rule is that a party need not be expressing an unconditional intention to perform by contracting, and may instead be expressing an intention either to perform or suffer the ordinary contractual consequences for a breach." 224 F. Supp. 2d at 527 n.5 (quoting VTech Holdings Ltd. v. Lucent Techs., Inc., 172 F. Supp. 2d 435, 439 (S.D.N.Y. 2001)).

To recover damages for fraud under New York law, a plaintiff must allege: (1) a misrepresentation of fact which was false and known to be false by the defendant; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation; and (4) damages suffered as a result of such reliance. See AUSA Life Ins. Co. v. Ernst and Young, 206 F.3d 202, 208 (2d Cir. 2000) (citing Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 80 (1996)).

Priddis's fraud claim should be dismissed for two basic reasons: (1) the alleged false statements set forth in the Complaint only involve TWEC's alleged intentions regarding its performance of its duties under the contracts between the parties; and (2) the fraud claim is duplicative of the breach of contract claim.

A. Alleged False Statements Which Only Indicate An Intent To Perform Under A Contract Cannot Support A Fraud Claim

As stated above, Priddis alleges three fraudulent misrepresentations by TWEC that it detrimentally relied upon. The alleged misrepresentations consist of: (1) a promise to release an $86,000 payment to Priddis (Compl ¶¶ 66-68, 85-87); (2) promises, both orally and in writing, that TWEC would make payments so that Priddis would ship new orders to TWEC (id. ¶ 80-84); and (3) a promise to release a $360,947 payment of which TWEC only paid $220,143 (Compl ¶¶ 88-90).[4] These allegations merely involve claims that TWEC made intentionally false statements concerning its intent to fulfill its obligations under the parties' contracts.

The applicable case law has repeatedly held that such allegations cannot, as a matter of law, support a fraud claim. See Bridgestone/Firestone Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 19-20 (2d Cir. 1996) (dismissing fraud claim on the ground that the defendants' representations that they intended to remit payment to the plaintiff "amount to little more than intentionally-false statements by [defendant] indicating his

[4] Under Fed. R. Civ. P. 9(b), a complaint alleging fraud must: (1) specify the statements that the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. See Stevelman v. Alias Research Inc., 174 F.3d 79, 84 (2d Cir. 1999). Priddis's second allegation – that TWEC made promises, both orally and in writing, that it would make payments so that Priddis would ship new orders to TWEC – does not meet this standard. Even assuming that it does, these three alleged misrepresentations are the only statements identified in the Complaint that possibly could pass scrutiny under Rule 9(b).

For example, with respect to fraudulent inducement, Priddis conclusorily states that "TWEC made numerous false representations regarding its intention to pay for products, as detailed above, with the intent to deceive Priddis and to induce Priddis to enter into a relationship with TWEC and continue to send products to TWEC. Compl. ¶ 126 (emphasis added). Priddis, however, fails to allege any fraudulent statement that TWEC made to Priddis before entering into the contract for the purpose inducing Priddis to enter into an agreement. Cf. Cohen v. Koenig, 25 F.3d 1168, 1173 (2d Cir. 1994) ("[A]lthough a plaintiff is not allowed to 'dress up' a breach of contract claim as a fraud claim, a valid fraud claim may be premised on misrepresentations that were made before the formation of the contract and that induced the plaintiff to enter the contract.") (citations omitted).

intent to perform under the contract. That is not sufficient to support a claim for fraud under New York law"); Cranston Print Works Co. v. Brockman Int'l A.G., 521 F. Supp. 609, 614 (S.D.N.Y. 1981) (dismissing fraud claim on the ground that a defendant's alleged false representation that it would pay the plaintiff for partial shipments merely amounted to "the failure to perform the promises of future acts which constitute the contractual obligations" of the parties); Frontier-Kemper Constructors, Inc., 224 F. Supp. 2d at 526 (dismissing fraud claim where the defendant allegedly made fraudulent misrepresentations in connection with the parties' agreement to obtain additional insurance, and promised to reimburse the plaintiff's costs of the insurance, on the ground that the allegations did not state a claim for fraud when the defendant simply "made fraudulent statements that it was performing the contract, when it allegedly had breached the contract."); Metropolitan Transp. Auth. v. Triumph Adver. Prods., Inc., 116 A.D.2d 526, 527, 497 N.Y.S.2d 673, 675 (1st Dep't 1986) (dismissing fraud claim where the plaintiff's allegation – that the president of an advertising agency submitted a bid for a contract to print subway maps fraudulently and in bad faith with no intent to perform -- "allege[d] only a breach of the representation of performance implicit in making the bid and a subsequent assurance of performance."); see also Greenberg v. Chrust, 198 F. Supp. 2d 578, 583-84 (S.D.N.Y. 2002) (dismissing fraud claim where allegations were based on the defendant's alleged promises to perform future acts); Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1160-61 (S.D.N.Y. 1996) ("a contract claim cannot be converted into a fraud claim by the addition of an allegation that the promisor intended not to perform when he made the promise.") (collecting cases).

Accordingly, Priddis fails to allege any misrepresentation that would support its claim for fraud under New York law.

B. Priddis's Cause Of Action For Fraud Must Be Dismissed As Duplicative Of Its Breach Of Contract

Priddis's fraud claim fails for the equally fatal reason that the allegations underlying TWEC's alleged fraud are the very same allegations which comprise the claim that TWEC is liable for breach of contract. Indeed, as shown above, Priddis uses each factual allegation contained in the Complaint to support its breach of contract claim. Simply put, Priddis's breach of contract claim and fraud claim are cut from the same cloth.

New York law, however, "requires that a fraud claim, raised in a case that stems from breach of contract, be sufficiently distinct from the breach of contract claim." Great Earth Int'l Franchising Corp., v. Milks Dev., 311 F. Supp. 2d 419, 425 (S.D.N.Y. 2004) (emphasis supplied) (citing Bridgestone/Firestone, Inc., 98 F.3d at 20). In order for its fraud claim to be "sufficiently distinct," Priddis must demonstrate either: (1) a legal duty separate from the duty to perform under the contract; (2) a fraudulent misrepresentation collateral or extraneous to the contract; or (3) special damages that are caused by the misrepresentation and are not recoverable as contract damages. Id. (citations omitted). Priddis's fraud claim does not meet any of these requirements.

Priddis does not meet the first exception under Bridgestone/Firestone because the Complaint does not allege that Priddis and TWEC had any legal duty other than a duty to perform under the Buy Out Agreement, the Vendor Agreement and the Display Agreement. Cf. Great Earth Int'l Franchising Corp., 311 F. Supp. 2d at 426 (holding that the first exception to Bridgestone/Firestone was met where "a party selling pharmaceuticals intentionally included illegal ingredients in its products and mislabel[ed] them to hide its deeds," because the applicable public health and safety regulations conferred "a legal duty separate from the duty to perform under the contract."). No such extraneous legal duty is alleged here because it does not exist.

Priddis also fails to allege a fraudulent misrepresentation that is either collateral or extraneous to the contracts between the parties. As fully set forth in Point I(A) above, Priddis only alleges that TWEC misrepresented a future intent to perform its obligations under the parties' agreements. These allegations, however, do not satisfy the second requirement of Bridgestone/Firestone because they are not separate and distinct from Priddis's contract claim. See Frontier-Kemper Constructors, Inc, 224 F. Supp. 2d at 528 ("in order to be considered 'collateral,' the promise must be a promise to do something other than what is expressly required by the contract") (citing Hudson Optical Corp. v. Cabot Safety Corp., 971 F. Supp. 108, 109 (E.D.N.Y.1997), aff'd, 162 F.3d 1148 (2d Cir.1998)); MCI Worldcom Communcations, Inc. v. North Am. Communications Control, Inc., No. 98 Civ. 6818 (LTS), 2003 WL 21279446, *9 (S.D.N.Y. June 4, 2003) (Viable fraud claims only exist where the alleged fraudulent statements concern matters separate and distinct from the subject matter of the contract.) (Exh. 2);[5] Papa's-June Music, Inc., 921 F. Supp. at 1162 (dismissing fraud claim where '[t]he complaint does not allege a fraud claim that is sufficiently distinct from the breach of contract claim" but "merely appends allegations about [the defendant's] state of mind to the claim for breach of contract")

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[5] All unreported electronic cases are compiled in a separate filing entitled "Cases Reported Exclusively On Computerized Databases") (hereinafter "Exh. ___).

Moreover, "[w]hether a promise is collateral or extraneous to an agreement depends entirely on the contours of the agreement." Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp. 2d 609, 616, n. 11 (S.D.N.Y. 2003). The alleged misrepresentations here are not collateral or separate from the parties' contractual relationship for the additional reason that TWEC's alleged promises and subsequent failures to pay Priddis are exclusively governed by the Vendor Agreement and Buy Out Agreements-- i.e., those agreements set forth the terms whereby TWEC was to remit payment to Priddis. See MCI Worldcom Communcations, Inc., 2003 WL 21279446, at *10 (Where Article 4 of the Agreement provided for the application of a $400,000 credit, alleged misrepresentations regarding the credit did not concern false representations regarding a present fact separate from the Agreement but, rather, concerned the operation of the Agreement itself) (Exh. 2); Lam v. Am. Express Co., 265 F. Supp. 2d 225, 231 (S.D.N.Y. 2003) ("To describe plaintiff's claim is to expose its fundamental flaw. Defendant's promise to negotiate exclusively with plaintiff plainly was not collateral to the [contract], it was memorialized in that agreement as defendant's principal obligation. Thus, defendants' allegedly false statements of future intent cannot support the present cause of action.") (quoting Int'l Cabletel Inc. v. Le Groupe Videotron Ltee, 978 F. Supp. 483, 488 (S.D.N.Y. 1997)).

Finally, the third Bridgestone/Firestone exception is also not satisfied because the Complaint fails to allege any special damages caused by the alleged misrepresentations. "Special damages," in this context "must reasonably be anticipated at the time the contract was made," DynCorp v. GTE Corp., 215 F. Supp. 2d 308, 326 (S.D.N.Y. 2002) (citation omitted), and the injury "must flow directly and proximately from the fraud, rather than from the breach of contract." Great Earth Int'l Franchising Corp., 311 F. Supp. 2d at 430. Priddis does not allege – because it cannot – any damages distinct from its contractual claim. See Compl ¶ 37.

In sum, TWEC's alleged false promises to perform future acts under the parties' agreements cannot support Priddis's claim for fraud. Priddis's fraud claim is nothing more than a repackaged and relabeled breach of contract claim and, as such, should be dismissed as a matter of law. See Bridgestone/Firestone, 98 F.3d at 20 (citation omitted) (stating that even if an allegation of an intentionally false statement meets all the elements of a proper fraud claim, it cannot support a claim for fraud where it is "premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement.").

II. PRIDDIS'S CLAIMS FOR CONVERSION AND UNJUST ENRICHMENT MUST BE DISMISSED AS A MATTER OF LAW.

Priddis's claims for conversion and unjust enrichment are premised on the idea that TWEC unlawfully appropriated products that Priddis shipped to TWEC. For the reasons stated below, both claims must also be dismissed as duplicative of Priddis's breach of contract claim.

A. Priddis's Conversion Cause Of Action Must Be Dismissed As Duplicative Of The Breach Of Contract Claim

Under New York law, a "denial or violation of the plaintiff's dominion, rights, or possession, is the basis of an action for conversion." Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 487, 462 N.Y.S.2d 413, 415 (1983) (quoting 23 N.Y. Jur. 2d Conversion, and Action for Recovery of Chattel § 3, at 210). "A conversion implies a wrongful act, a misdelivery, a wrongful disposition, or withholding of the property." In re Chateaugay, 10 F.3d 944, 957 (2d Cir. 1993) (citation omitted). A claim of conversion is subject to the well established principle that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Pandisc Music Corp. v. Red Distrib., LLC, No. 04 Civ. 9365 (GEL), 2005 WL 646216 (S.D.N.Y. Mar. 18, 2005) (dismissing conversion claim as duplicative of contract claim where defendant's possession of plaintiff's property was governed by the contract not by "the independent duties owed by one citizen to another under general tort principles") (citation omitted) (Exh. 3); Dervin Corp. v. Banco Bilbao Vizcaya Argentaria, S.A., No 03 Civ. 9141(PKL), 2004 WL 1933621, at *5 (S.D.N.Y. Aug. 30, 2004) (Exh. 4).

Here, Priddis bases its conversion claim upon allegations that TWEC improperly possessed Priddis's products because it failed to properly compensate Priddis for those products. Compl. ¶¶ 157-60. These allegations, however, entirely arise from TWEC's alleged failure to pay Priddis in violation of the parties' agreements, and do not "allege any distinct harm [or] . . . distinct duties giving rise to tort liability." Spanierman Gallery, PSP v. Love, No. 03 Civ. 3188 (VM), 2003 WL 22480055, at *3 (S.D.N.Y. Oct. 31, 2003) (dismissing conversion claim as duplicative of contract claims where plaintiff's allegations regarding defendant's conduct amounted to a violation of the parties' contract.) (Exh. 5); In re Chateaugay, 10 F.3d at 958 (affirming dismissal of conversion claim as a matter of law where plaintiff essential sought enforcement of contractual bargain). Accordingly, Priddis's claim for conversion is not separate and distinct from its contractual claims and must be dismissed as a matter of law.

B. Priddis's Unjust Enrichment Cause Of Action Must Be Dismissed As Duplicative Of The Breach Of Contract Claim

Priddis's unjust enrichment claim suffers from the same flaw. To state a cause of action for unjust enrichment, a plaintiff must allege facts demonstrating that a defendant has been enriched at plaintiff's expense, and that retention of the benefit would be unjust. Hutton v. Klabal, 726 F. Supp. 67, 72 (S.D.N.Y.1989); Mayer v. Bishop, 158 A.D.2d 878, 880, 551 N.Y.S.2d 673, 675 (3d Dep't 1990). However, unjust enrichment is a quasi-contractual doctrine that applies only in the absence of a valid and enforceable contract. In re Chateaugay, 10 F.3d at 958. Under New York law, the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 656 (1987).

Like its claim for conversion, Priddis's claim for unjust enrichment alleges that TWEC benefited from receiving Priddis's products without properly compensating Priddis – a duplication of its breach of contract claim. Compl. ¶¶ 152-55. Accordingly, Priddis's unjust enrichment claim cannot be maintained because its contractual claims govern the same subject matter and are based upon TWEC's alleged breach of valid and enforceable agreements. Briggs v. Goodyear Tire & Rubber Co., 79 F. Supp. 2d 228, 236 (W.D.N.Y. 1999) (dismissing unjust enrichment claims for failure to state a claim upon which relief may be granted, stating that "[w]here there exists a valid and enforceable written contract governing a particular subject matter, quasi contractual claims, including claims for unjust enrichment and constructive trust are not allowed.") (citation and internal quotation marks omitted); ESI, Inc. v. Coastal Power Prod., Co., 995 F. Supp.

419, 437 (S.D.N.Y.1998) (holding that unjust enrichment and constructive trust apply only in absence of valid and enforceable contract).

III. PRIDDIS'S CLAIM OF BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS DUPLICATIVE OF THE BREACH OF CONTRACT CLAIM AND MUST BE DISMISSED

Priddis alleges that TWEC breached the implied covenant of good faith and fair dealing by withholding from Priddis the benefits of the Buy Out Agreement, Display Agreement and Vendor Agreement. Compl ¶¶ 140-143. Priddis's claim for breach of the implied covenant of good faith and fair dealing must be dismissed because it is based upon the same factual allegations as its breach of contract claim.

Under New York law, a covenant good faith and fair dealing is implied in all contracts. Carvel Corp. v. Diversified Mgmt. Group, Inc., 930 F.2d 228, 230 (2d Cir. 1991). "The boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract." Cross & Cross Props., Ltd. v. Everett Allied Co., 886 F.2d 497, 502 (2d Cir.1989). As such, courts will not impose such a duty if it conflicts with other terms in the parties' contractual relationship, see Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 390, 639 N.YS.2d 977, 980 (1995) (citation omitted). The obligation of good faith also does not create any obligations that go beyond those intended and stated in the language of the contract. Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp. 2d 275, 305 (S.D.N.Y. 1998).

Although New York law recognizes the existence of the implied duty of good faith and fair dealing, it does not recognize a separate cause of action for breach of the duty. Wolff v. Rare Medium, Inc., 210 F. Supp. 2d 490, 497 (S.D.N.Y.2002). Rather, the appropriate cause of action is simply one for breach of the underlying contract. See

Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056 (2d Cir.1992); Village on Canon v. Bankers Trust Co., 920 F. Supp. 520, 535 (S.D.N.Y.1996) (dismissing a breach of the implied duty of good faith on the basis that it is not an independent cause of action).

Additionally, "[a] claim for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of the underlying contract." ICD Holdings S.A. v. Frankel, 976 F. Supp. 234, 243-44 (S.D.N.Y.1997); Geler v. Nat'l Westminster Bank USA, 770 F. Supp. 210, 215 (S.D.N.Y.1991) (same); Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 237 (1983) (holding that the implied obligation is simply "in aid and furtherance of other terms of the agreement of the parties."). Thus, a claim for breach of the implied covenant of good faith may only be brought if it is based on allegations that are separate and distinct from those underlying the accompanying breach of contract claim. See Siradas v. Chase Lincoln First Bank, N.A., No. 98 Civ. 4028 (RCC), 1999 WL 787658, *6 (S.D.N.Y. Sept.30, 1999) (Exh 6).

Here, Priddis' claim for breach of the implied covenant of good faith and fair dealing is not only based upon the same allegations as its breach of contract claim, but Priddis also expressly acknowledges that TWEC's alleged breaches of the parties' agreements are the only facts that underpin its good faith and fair dealing claim. Compl. ¶¶ 143-44 ("TWEC's breaches of the implied covenants of good faith and fair dealing in the Buy Out Agreement, Display Agreement and Vendor Agreement were intentional ... [and] [a]s a proximate result of TWEC's breaches of these agreements, Priddis has suffered and will continue to suffer direct harm and consequential damages.").

Accordingly, Priddis claim of breach of the implied duty of good faith and fair dealing must be dismissed as duplicative of its breach of contract claim.

IV. PRIDDIS'S CLAIMS FOR PUNITIVE DAMAGES AND ATTORNEYS' FEES MUST BE DISMISSED

Priddis alleges, that based on TWEC's fraudulent conduct, it is entitled to exemplary or punitive damages. Compl. ¶ 130. Priddis also seeks to recover attorneys' fees and costs as permitted by law. Id., Prayer for Relief, ¶ 3. The Court should dismiss both claims.

A. Punitive Damages Are Not Available For Priddis's Ordinary Breach of Contract Claim

Should the Court grant TWEC's motion to dismiss Priddis' tort claims (essentially reducing the Complaint to an ordinary contract action), the Court should also dismiss the claim for exemplary damages. Carvel Corp. v. Noonan, 350 F.3d 6, 24 (2d Cir. 2003) ("Punitive damages are unavailable in ordinary contract actions."). Accordingly, Priddis' request for exemplary damages should be stricken as a matter of law.

B. No Basis Exists To Award Priddis Attorneys' Fees

New York follows the prevailing "American Rule" and, thus, an award of attorneys' fees is only appropriate where "specifically provided for by statute or contract." Asturiana De Zinc Mktg., Inc., v. LaSalle Rolling Mills, Inc., 20 F. Supp. 2d 670, 674 (S.D.N.Y. 1998) (quoting Marotta v. Blau, 241 A.D.2d 664, 659, 659 N.Y.S.2d 586, 586 (3d Dep't 1997)). Here, The Vendor Agreement specifically states that TWEC "will not under any circumstances be liable for: interest, finance charges, legal fees, or any consequential or incidental damages of any kind." Vendor Agreement, at 2, Exh C.

Additionally, no statute exists upon which an award of attorneys' fees could be based. Priddis' claim for attorneys' fees should therefore be dismissed.

CONCLUSION

Based on the foregoing, TWEC's motion to dismiss should be granted and Priddis' causes of action for fraud, conversion, unjust enrichment, and breach of the implied covenant of good faith and fair dealing dismissed for failure to state any claim upon which relief may be granted. Additionally, Priddis's request for exemplary damages and attorneys fees should be stricken.

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Respectfully submitted,

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